Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
05/11/2012 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2010-007912-002 DT 05/09/2012

HONORABLE PAUL J. MCMURDIE

CLERK OF THE COURT
S. LaMarsh
Deputy

STATE OF ARIZONA

KIRSTEN VALENZUELA
HILARY L WEINBERG

v.

ELDRIDGE AUZZELE GITTENS (002)

SUSAN L COREY
PETER JONES
ALAN ISSA TAVASSOLI
ANDREW ANDERSON CLEMENCY
LISA SHANNON
KENNETH S COUNTRYMAN
KELLIE SANFORD
ROBYN GREENBERG VARCOE
DAVID J KEPHART
DANIEL R RAYNAK
REGINALD L COOKE

CAPITAL CASE MANAGER

RULING

The Court has considered Defendant Gittens' Motion to Dismiss Counts 8 and 9 of the Indictment as Multiplicitous and Defendant Jerry Cockhearn's Joinder to Eldridge Gittens' Motion to Dismiss Indictment as Multiplicitous, the State's Response, Defendants' Replies, and the arguments of the parties. The Court makes the following ruling.

Defendants are charged in Count 8 with conspiracy to commit armed robbery, Count 9 with conspiracy to commit sale of marijuana, and Count 10 with conspiracy to possess marijuana for sale. All three offenses are alleged to have occurred on or about July 28, 2010. Defendants

assert that these counts are multiplicitous because they charge multiple conspiracies when only one agreement exists.

Charges are multiplicitous if they charge a single offense in multiple counts. *Merlina v. Jejna*, 208 Ariz. 1, 4 (App., 2004). Multiplicitous charges raise the potential that a defendant may be subjected to double punishment. *Id*.; *State v. Powers,* 200 Ariz. 123, 125 (App., 2001), *approved by* 200 Ariz. 363 (2001). The Court determines multiplicity by applying the test enunciated in *Blockburger v. United States,* 284 U.S. 299 (1932). Offenses are not the same, and therefore not multiplicitous, if each requires proof of a fact that the other does not.

The elements of conspiracy are (1) an agreement to commit an illegal act and (2) an overt act in furtherance of the agreement. A.R.S. § 13-1003.A; *State v. Sodders,* 130 Ariz. 23, 26 (App., 1981). As plead, Defendants are charged in Counts 8-10 with three separate conspiracies: (1) an agreement to commit an armed robbery (Count 8); (2) an agreement to sell marijuana (Count 9); and (3) an agreement to possess marijuana for sale. Each count requires proof of a fact that the other counts do not. The indictment is not multiplicitous on its face.

The crux of Defendants' claim is that there are not three separate conspiracies but rather one conspiracy with multiple objects. *See,* A.R.S. § 13-1003.C (providing that "[a] person who conspires to commit a number of offenses is guilty of only one conspiracy if the multiple offenses are the object of the same agreement or relationship...."). However, whether or not there are separate conspiracies to commit multiple offenses is a question of fact. *See State v. Gaydas,* 159 Ariz. 277, 279 (App., 1988) (holding that the factual basis for defendant's guilty plea established three separate agreements to sell narcotic drugs to an undercover officer, and thus three distinct conspiracies). Thus, Defendants' claim goes not to the indictment on its face, but to the evidence that will be presented to prove these counts, and they have no basis to object before that evidence is presented. *State v. Klokic*, 219 Ariz. 241, ¶ 12 (App., 2008) (discussing duplicitous charge versus duplicitous indictment).

Moreover, multiplicitous counts are not necessarily fatally flawed. *Merlina*, 208 Ariz. at ¶ 13. As long as they do not result in multiple punishment, the charges alone do not violate double jeopardy. *Id.* at ¶ 14. The danger of multiple punishment can be remedied at sentencing by merging the convictions and imposing one sentence. *Id*.

Defendants rely on North Carolina law in support of their proposition. However, the North Carolina courts also hold that this issue is a question of fact:

> The question of whether multiple agreements constitute a single conspiracy or multiple conspiracies is a question of fact for the jury. The nature of the agreement or agreements, the objectives of the conspiracies, the time interval

> between them, the number of participants, and the number of meetings are all factors that may be considered.

State v. Tirado, 358 N.C. 551, 577, 599 S.E.2d 515, 533 (2004).

Defendant Cockhearn also asserts that Count 10 should be dismissed because it is a lesser-included offense of Count 9, and Count 11 (attempted sale or transportation of marijuana) should be dismissed because it is a lesser-included offense of Count 12 (sale or transportation of marijuana). Assuming *arguendo* that Counts 10 and 11 are lesser-included offenses of Counts 9 and 12, respectively, *Merlina* expressly rejected the contention that charging both greater and lesser-included offenses requires dismissal. 208 Ariz. at ¶ 19 ("[T]he State is not barred from charging both lesser-included and greater offenses."). Any possible prejudice can be prevented by a curative instruction. *Id*. at ¶ 18.

IT IS ORDERED denying Defendant's Gitten's Motion to Dismiss Counts 8 and 9 of the Indictment as Multiplicitous, and Defendant Jerry Cockhearn's Joinder to Eldridge Gittens' Motion to Dismiss Indictment as Multiplicitous.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.